Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 78-1427

DON ROSS and MICHAEL ZABARAC,
Petitioners,

versus

IRVIN SWARTZBERG, et al,
Respondents

From the:

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois
Cause No. 78-1629

On Appeal From:

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
Number: 77-C-3227
Honorable FRANK J. MCGARR, *Judge Presiding*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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CITATIONS

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1331.

The amount in controversy is estimated at $10,000, exclusive of interest and costs.

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THE QUESTIONS ARE SUBSTANTIAL

This Court is requested to grant certiorari since Rule 41(b) of the Rules of Civil Procedure is being misinterpreted as "barring" the filing of a subsequent complaint when a previous action has not been dismissed on the merits.

Since there has been no determination by the United States District Court that the plaintiff has no cause of action, but that the judge found that the plaintiff had filed a complaint that was "discursive and disjointed", there was no finding that plaintiffs did not have a cause of action.

The action is important since plaintiff seeks to enforce a previous determination and judgment of liability of the officers and directors for illegally cancelling and terminating an automobile franchise to a dealer; as a result of a judgment entered against AMCO INDUSTRIES INC. in the case entitled: *Buggs Imports* vs. *AMCO,* U.S. District Court, Eastern District of Kentucky, Number 2237, in the sum of $1,670,625.

The shareholders have a right to collect from officers and directors who violate their fiduciary duties and as such are accountable to the shareholders. See: *Smith* v. *Bishop* (1962) 26 Ill. 2d 434, 436; *Am. Nat. Bk & Trust Co.* v. *Zoning Bd. of Appeals* (1973) 12 Ill. App. 3d 794, 797.

The trial court abused its discretion in dismissing the complaint when it was never heard on the merits.

Depositions were barred; and other relief was denied by the court.

The new complaint filed in this cause was "strictly" for the purpose of enforcing the liability of the officers and directors to the shareholders.

STATEMENT OF THE CASE

The litigation commenced with the filing of a Complaint to force the Defendant-Appellee corporation to conform to decisions in the United States District Court for the Eastern Division of Kentucky, and to account to the shareholders for the loss that they sustained, as a result of the judgment entered in the case there entitled: *Buggs Imports, Inc.* vs. *Amco Industries, Inc.,* 2237, U.S. District Court for the Eastern District of Kentucky.

That the United States District Court in that case entered a judgment order of $1,670,625 plus attorney fees of $100,000, as a result of the illegal acts of the directors and officers.

That in the case at bar, the officers and directors are liable to the shareholders and their rights cannot be diverted by a procedural matter and a misinterpretation of the Rules of Court.

That in a former case entitled: *Don Ross et al* vs. *Irvin Swartzberg,* the United States District Court dismissed the Complaint as "being discursive and disjointed."

An attempt was made to amend the complaint; and the Court held the motion should have been made with ten days, pursuant to Rule 59(b) of the Rules of Civil Procedure for the United States District Courts.

Plaintiffs-Appellants filed a new case in the United States District Court, entitled: DON ROSS, et al, vs. IRVIN SWARTZBERG, 77 C 3227.

The new case sought to force the officers and directors of the appellee corporation to comply with the judgment order entered in the United States District Court for the Eastern District of Kentucky in the case entitled: *Buggs Imports, Inc.* vs. *Amco Industries, Inc.,* 2237

That it is the contention of the Petitioners that this is not a case of res judicata.

The case was not decided on its merits. The judge merely said that the complaint was discursive and disjointed.

No order was entered that the Complaint was stricken with prejudice, 75 C 4402, *Ross v. Swartzberg.*

Your Petitioners are seeking an interpretation of Rule 41(b) of the Federal Rules of Civil Procedure which states:

> "Unless the court in its order of dismissal otherwise specifies, a dismissal under this subdivision, and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

The general rule states that judgment is on the merits if it completely disposes of the underlying cause of action. See: *Cromwell* v. *County of Sacramento,* 94 U.S. 351.

On the other hand, traditionally a judgment for the defendant was not on the merits when it was based on rules of substantive law. See: Restatement, Law of Judgments, supra, section 49, comment at 193.

In determining whether a particular order is final for res judicata purposes, it must terminate the litigation and fix and dispose of the parties' rights as to the issues raised by the suit.

This was not done in the case at bar, where the court held that the complaint was "discursive and disjointed." Case No. 75 C 4402, U.S. District Court for Northern District of Illinois, Eastern Division.

The court did not determine that plaintiffs did not have a cause of action against the defendants, in accordance with the decision rendered in the case of: *Buggs Imports*

Inc. v. *AMCO Industries, Inc.* in the U.S. District Court for the Eastern District of Kentucky, number 2337.

The defendants could not escape their liability since the decision of the District Court in the Eastern District of Kentucky *determined that they had no right to cancel the franchise,* et cetera, of Buggs Imports.

The action in cancelling the franchise was approved by the officers and the Board of Directors and their liability is definite. It was not a matter of discretion, or an abuse of discretion. It was deliberate.

It must be borne in mind that there was no dismissal with prejudice.

It is that factor that this Court must determine; and it is not a violation of Rule 41 of the Federal Rules of Civil Procedure.

The Plaintiff in its cause of action has a right to determine whether or not he wishes to appeal or to file a new cause of action.

The Court of Appeals, in *Gilbert* v. *Braniff Intern. Corp.,* 579 F.2d 411 (1978) at 413, held:

> "In determining whether a particular order is final, Illinois reviewing courts look to the substance of the order rather than its technical form. *Browning* v. *Heritage Ins. Co.* 20 Ill. App. 3d 622, 314 N.E.2d 1 (1974); *Bates* v. *Ullrich,* 38 Ill. App. 3d 203, 347 N.E.2d 286 (1976); *O'Fallon Development Co.* v. *City of O'Fallon,* 43 Ill. App. 3d 348, 2 Ill. Dec. 6, 346 N.E.2d 1293 (1976); *Peach* v. *Peach supra, Martin* v. *Masini,* 90 Ill. App.2d 348, N.E.2d 770 (1967). So, viewing the order involved in this case, we find that it lacks finality."

The court further held:

> "Because the state court dismissal order was not a final adjudication on the merits of a cause of action by operation of Rule 273, res judicata could not properly be invoked to bar the subsequent filing in federal court of a complaint based on the same operative facts."

The court in the Gilbert Case makes the point that the determination must be a "final adjudication on the merits which then can be raised as a bar to subsequent litigation under the principles of *res judicata.*

The District Court in the case at bar never had the opportunity of determining whether or not the shareholders had a right to determine the liability of the officers and directors in illegally cancelling the franchise of Buggs Imports, Inc.

A close examination of the prior decisions and adjudications among the cases decided in the various circuits throughout the United States leads one to the conclusion that Rule 41 is being misinterpreted as barring a subsequent lawsuit when a prior dismissal was made without "prejudice", and not on the merits.

The present decisions leave the Courts of Appeals in the various circuits in a state of "flux". It is therefore requested that this Court grant this petition for a writ of certiorari.

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Respectfully submitted,

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APPENDIX

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IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75C-4402

DON ROSS, EDWARD McDONALD, MICHAEL ZABARAC, and WILLIAM HENNING RUBIN,

Plaintiffs

v.

IRVIN SWARTZBERG, J. MYRON BAY, ADOLPH HIRSCH, ROBERT GORDON, JACK SOLOMON, Jr., doing business as IRVRU, a Partnership, successor, transferee and distributee of the assets of IRVRU, INC., an Illinois corporation, pursuant to the resolution of said corporation on the 29th day of December, 1970; AMCO INDUSTRIES, INC., a Delaware corporation, HAL M. QUINN, President and Chief Operating Officer of AMCO INDUSTRIES, INC., and LA SALLE NATIONAL BANK, a national banking association, registrar and transfer agent of AMCO INDUSTRIES, INC.; TOYOTA MOTOR COMPANY, LTD., a Japan corporation; TOYOTA MOTOR SALES COMPANY, LTD., a Japan corporation, TOYOTA MOTOR DISTRIBUTORS, INC., a California corporation, and T M D, INC., a subsidiary of the parent corp., TOYOTA MOTOR DISTRIBUTORS, INC., and a Delaware corporation, and ISAO MAKINO, TSUNEO MORIYA, and TAKAYUKI OSUKA,

Defendants

AMENDED COMPLAINT TO RESCIND MERGER AND FOR VIOLATIONS OF TITLE 15 U.S.C., SECTION 122, OF THE AUTOMOBILE DISTRIBUTORS FRANCHISE ACT OF 1956, AND FOR VIOLATIONS OF SECTION 1o(b) OF THE SECURITIES EXCHANGE ACT OF 1934 (EXCHANGE ACT) 15 U.S.C. 78(aa)[1] et. seq., AND FOR VIOLATIONS OF SECTION 17(a) OF THE SECURITY ACT OF 1933, 15 U.S.C., SECTION 77 (q)(a) AND SECTION 1331 and 1332 OF THE U.S. CODE OF JUDICIARY AND JUDICIAL PROCEDURES

PLAINTIFFS, DON ROSS, EDWARD McDONALD, MICHAEL ZABARAC, , shareholders of Defendant AMCO INDUSTRIES, INC., for and on behalf of themselves and all other shareholders in a representative capacity similarly situated, hereby complain of the following Defendants: IRVING SWARTZBERG, J. MYRON BAY, ADOLPH HIRSCH, ROBERT GORDON, JACK SOLOMON, Jr., doing business as IRVRU, a partnership successor, transferee, and distributee of the assets of IRVRU, INC., an Illinois corporation pursuant to the resolution of said corporation on the 29th day of December, 1970, AMCO INDUSTRIES, INC., a Delaware corporation, HAL M. QUINN, President and Chief Officer of AMCO INDUSTRIES, INC.; LA SALLE NATIONAL BANK, TOYOTA MOTOR COMPANY, LTD., a Japan Corporation, TOYOTA MOTOR SALES, LTD.; a Japan Corporation; TOYOTA MOTOR DISTRIBUTORS, INC., a California corporation, TMD INC., a Subsidiary of TOYOTA MOTOR DISTRIBUTORS, INC., the parent corporation; and ISAO MAKINO, TSUNEO MORIYA; and TAKAYUKI OSUKA.

PLAINTIFFS

DON ROSS is a resident of the City of Huntington Beach, California, and a shareholder of AMCO INDUSTRIES, INC., a Delaware corporation; EDWARD McDONALD, is a resident of Grosse Point Wood, Michigan, a shareholder of AMCO INDUSTRIES, INC., and MICHAEL ZABARAC is a resident of North Carolina and a shareholder of AMCO INDUSTRIES, INC.; all of the above plaintiffs were shareholders at the time of the transactions alleged in this Complaint.

DEFENDANTS

IRVING SWARTZBERG, is a resident of the City of Chicago and held himself out as Chairman of the Board of AMCO INDUSTRIES, INC., J. MYRON BAY, is a resident of the City of Chicago and State of Illinois and has held himself out as a director of AMCO INDUSTRIES, INC., MAX BECKER, is a resident of the City of Chicago and State of Illinois, and has held himself out as a director and Treasurer of Defendant, AMCO INDUSTRIES, INC.; ADOLPH HIRSCH is a resident of the City of New York and State of New York, and has held himself out as a director of Defendant, AMCO INDUSTRIES, INC.

HAL M. QUINN, is a resident of the City of Chicago and State of Illinois, is presently President and Chief Operating Officer of Defendant, AMCO INDUSTRIES, INC.; LA SALLE NATIONAL BANK, a national banking association, is the registrar and transfer agent of AMCO INDUSTRIES, INC.; See Proxy Statement, pages 2 and 3, attached hereto and incorporated herein as Exhibit "A"; TOYOTA MOTOR COMPANY, LTD., a Japan corporation, is the manufacturer of Toyota motor vehicles and parts and accessories; TOYOTA MOTOR SALES COMPANY, LTD., a Japan corporation, is the exporter of the motor vehicles and parts and accessories to other countries throughout the world. TOYOTA MOTOR SALES, INC., a California corporation (hereinafter referred to as "*TOYOTA*") is a subsidiary of TOYOTA MOTOR COMPANY, LTD. of Japan; TMD SUBSIDIARY, INC., a Delaware corporation, which is a subsidiary of TOYOTA MOTOR DISTRIBUTORS, INC., the parent corporation of TMD SUBSIDIARY, INC.; "TOYOTA" (TOYOTA MOTOR SALES, INC., a Calif. corp.) is the exclusive importer of Toyota motor vehicles and parts and acces-

sories for the continental United States, sells such products to eight distributors (one wholly owned and seven independent) in the United States. Three of the independent distributors are subsidiaries of AMCO; the wholly-owned distributor is TOYOTA MOTOR DISTRIBUTORS, INC., which is the direct parent of TMD, SUBSIDIARY INC., ("TMD"), the corporation which will be merged into AMCO. As the exclusive importer of TOYOTA MOTOR VEHICLES and parts and accessories, "TOYOTA" franchises the independent distributors for such products and has entered into distributorship agreements with AMCO's subsidiaries. "TMD" was formed solely for the purpose of being a party to the merger as the non-surviving corporation. ISAO MAKINO, TSUNEO MORIYA, and TAKAYUKI OSUKA, all were formerly Directors of "TOYOTA" and are presently Directors of AMCO, pursuant to the terms of the merger agreement.

JURISDICTION and VENUE

This action arises out of violations of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) 15 U.S.C. 78(aa)[1] et seq., and the Rules and Regulations promulgated thereunder by the Securities and Exchange Commission; and Section 17(a) of the Security Act of 1933, 15 U.S.C. Section 77(q)(a), and the Common Law Principles, and Title 15, Section 1221, Automobile Distributors Franchise Act of 1956, and Sections 1331 and 1332 of the U.S. CODE of Judiciary and Judicial Procedures and the principles of pendant jurisdiction.

That Defendant "TOYOTA" is the franchiser and exclusive importer of motor vehicles, parts and accessories

[1]*Starck* v. *Dewane* (1973 D.C.Ill.) 364 F.Sup.466 *Coalition to Advocate Public Utility Responsibility* v. *Engles*, 1973, 364 F.Sup. 1202. *International Controls* v. *Vesco*, 490 F.2d, 1334 *Investors Funding Corporation* v. *Jones*, 495 F.2d., 1000.

for the United States, and subsidiaries of TOYOTA MOTOR COMPANY, LTD., a Japan corporation, the parent company and manufacturer; and the manufacturer did not act in good faith in withholding delivery of cars to Defendant, AMCO INDUSTRIES, INC., in violation of Title 15 Section 1221 and 1222 U.S.C.

That the withholding of the delivery of cars, contrary to the terms of the franchise resulted in damage to Plaintiffs as well as all other shareholders of the class, since AMCO INDUSTRIES, INC. did not have a sufficient number of cars to meet the demands of their customers.

That "TOYOTA" is a subsidiary of the manufacturer, TOYOTA MOTOR COMPANY, LTD., a Japanese corporation, and is guilty of coercion and intimidation by threatening not to renew the franchise of "TOYOTA" in violation of Title 15, Section 1221 and 1222, USC and that this Court also has jurisdiction under the principles of pendant jurisdiction.

Further, that Defendants used the telephone, the United States Mail, and other means of communication in violation of Title 15, Section 78(aa).

There was a further 10 B 5 Violation in that the Officers and Directors refused to permit Plaintiffs to examine the corporate minute book as well as the other records of the corporation in order to send meaningful communications to the other shareholders. If the shareholders were permitted to examine the Corporate records of Defendant AMCO, pursuant to the demand made upon the Defendant Corporation, on the 17th day of July, 1975, Plaintiffs-Shareholders would have been able to submit to the Securities and Exchange Commission, for their consideration, a meaningful proxy statement in opposition to the proposal to sell the stock of AMCO INDUSTRIES INC. The Officers and

Directors of AMCO, who are Defendants herein, chose to oppose the examination contrary to the provisions of the Delaware Statute, on the pretext that the examination was not for a proper purpose. The Pleadings confirming this and the filing of a Mandamus suit, under the case entitled, *Don Ross, et al.*, vs. *Irvin Swartzberg, et al.*, 75 L 13624, have been filed as exhibits hereto in this proceeding.

COUNT I

Defendants, TOYOTA MOTOR COMPANY, LTD., "TOYOTA" (TOYOTA MOTOR SALES U.S.A., INC. a California corporation) TMD SUBSIDIARY, INC., violated the provisions of the Automobile Distributors Franchise Act of 1956, Title 15, Section 1221, U.S.C., by refusing to consent to an assignment of the franchise to another distributor or renewal and insisted on making AMCO INDUSTRIES, INC., its wholly owned subsidiary, pursuant to the provisions of the merger agreement hereinafter set forth.

That the arbitrary refusal of Defendant, "TOYOTA" and its subsidiaries to consent to a transfer of the "Franchise" theretofore granted to Defendant, AMCO INDUSTRIES, INC., was part of a scheme to depress the price per share that it would have to pay to the shareholders of AMCO INDUSTRIES, INC., for their stock pursuant to the provisions of the merger agreement.

That the refusal of Defendant, "TOYOTA" to consent to a renewal of the franchise agreement between it and AMCO, which expired 1978, was a violation of the provisions of Title 15, Section 1221 of the Automobile Distributors Franchise Act, since it was part of a conspiracy between the parent company and its subsidiaries to force the sale of AMCO to it exclusively and used the vehicle of merger to implement its conspiracy.

That it is quite clear that the parent company, "TOYOTA" by having its subsidiary, TMD SUBSIDIARY INC., merge with AMCO INDUSTRIES, INC., eliminated the franchise of distributor AMCO. That it was the intention of Congress in adopting the Automobile Act of 1956, Title 15, Section 1221, U.S.C., to prevent the manufacturer from taking advantage of the distributor and cancelling his franchise as well as preventing the manufacturer from being the sole distributor. That is exactly what has occurred in this instance.

The merger eliminated the distributor to the detriment of the distributor which are the shareholders.

The only difference is that the Defendants, the officers and directors as the result of the coercion of the controlling shareholder, IRVING SWARTZBERG (47%), consented to the merger to the detriment of all of the other shareholders.

That Defendant, IRVING SWARTZBERG, and his associates, acquired the 47% not by purchase in the open market, but by obtaining warrants for the purchase of stock at a price of $4.00 or less over a period of years, to the detriment of all the other shareholders.

COUNT II

That the Defendants in failing to disclose to the shareholders the manipulations that took place between the officers and directors who were partners in the company known as IRVRU COMPANY, and which owned and controlled 47% of the outstanding shares; that the current Proxy Statement failed to disclose that in 1971 and 1972, when Defendant, IRVING SWARTZBERG was exercising options and purchasing stock from $2.00 to $4.00 per share, the stock was trading as high as $15.00 per share. This is

specifically set forth in the 1972 Proxy Statement on file with the Securities and Exchange Commission.

The failure to permit the shareholders to examine the Corporate Minute Book was a 10-B-5 Violation, since it denied the shareholders the information that was granted them by the Corporation Act of the State of Delaware.

That on each and every occcasion Defendant IRVING SWARTZBERG exercised the warrants that were granted to him at depressed prices of $2.00 to $4.00 per share, as a "profit or inducement" to guarantee the loans of the corporation; the stock of the remaining shareholders was diluted and caused the price to decline.

IRVING SWARTZBERG as a controlling shareholder, as Chairman of the Board, and as a Director, had a special fiduciary duty not to dilute the other shareholders of their shares of stock received in the exercise of warrants, since it was unregistered stock, it should not have been voted in favor of a merger, which was only for the purpose of enabling IRVING SWARTZBERG, who is an elderly gentlemen, to "unload" his interest in the corporation to the detriment of the other shareholders.

That Defendant "TOYOTA" and Defendant AMCO, in order to prevent any dissent, conspired to ensure the adoption of the merger agreement, pursuant to the provisions of Section 262(k) of the General Corporation Law of the State of Delaware, instead of some other method since the shareholders did not have any right to dissent, under Section 262(k) of the law of Delaware.

That the takeover by merger and the refusal to extend the Special Agreement to a transfer preventing Defendant, AMCO from selling its assets and franchise to the highest shareholders.

COUNT III

That the defendant "TOYOTA" and Defendant, AMCO entered into a conspiracy with the officers and directors of AMCO INDUSTRIES, INC. to insure the take over by "TOYOTA" of the assets of AMCO.

That in furtherance of the conspiracy, Defendant AMCO and Defendant "TOYOTA" chose the route of merger pursuant to the provisions of Section 262(k) of the General Corporation Act of the State of Delaware.

That by using Section-262(k) of the General Corporation Law of the State of Delaware, *the shareholders who objected to the merger had no appraisal rights.*

That IRVRU COMPANY is the owner and registered holder of 47% of the outstanding stock of AMCO INDUSTRIES, INC., and its vote in favor of the passage meant instantaneous approval.

That since the officers and directors of AMCO are the same as the partners of IRVRU COMPANY, the IRVRU COMPANY should have disqualified itself from voting on the merger.

That the stock held by IRVRU COMPANY, nominee for IRVING SWARTZBERG, was unregistered stock having been received as the result of warrants issued at depressed prices. That a merger having been construed as a sale, it is illegal under the present case law to sell unregistered stock.

COUNT IV

That the acts of the officers and directors of Defendant, AMCO, by their illegal acts caused the Defendant AMCO to sustain a judgment against it in the U.S. District Court

in the sum of $1,670,625.00 plus attorneys' fees of $200,000.00, in the case entitled: *Buggs Imports, Inc.*, v. *Amco Industries, Inc., & its Subsidiary, Mid-Central Toyota Distributors, Inc.*, Case No. 2237, in the Eastern District of Kentucky.

That Defendant AMCO INDUSTRIES, INC. used Corporate funds in the sum of $850,000.00 to settle this obligation.

That the litigation resulted from the illegal acts of the officers and directors in cancelling the franchise agreements and they should be required to reimburse the corporation for all funds disbursed in settlement of the BUGGS IMPORT, INC. litigation.

That the settlement with BUGGS IMPORTS, INC. and dismissing the appeal was for the sole purpose of enabling Defendant IRVING SWARTZBERG and his associates to dispose of their stockholdings in the corporation.

COUNT V

That all of the acts of the Defendant, AMCO, and its officers and directors and the associates of IRVING SWARTZBERG, as reflected in the pleadings filed in the Mandamus suit; the setting of the meeting of shareholders on the date that the case (*Don Ross, et al.* v. *Irving Swartzberg, et al.*, No. 73 C 127) was set for hearing in the United States Court of Appeals, for oral argument, more than confirms the attitude and disregard of the rights of the shareholders by the major controlling shareholder, IRVING SWARTZBERG and his associates.

It would be a miscarriage of justice to permit controlling shareholders to disregard the rights of all other shareholders on the pretext that their examination is not for a proper purpose.

Plaintiffs as well as all the other shareholders of the class are not and will not be competitors to any of the Defendants.

The Plaintiffs and all other shareholders of the class are entitled to receive either through public or private sale, the true value of the assets of the Corporation.

That Plaintiffs made a demand on the officers and directors of Defendant AMCO, to institute legal proceedings to collect the $850,000.00 disbursed by the Corporation in its settlement of the claim of BUGGS IMPORTS, INC., and this was refused.

That Plaintiffs submitted to the Securities and Exchange Commission proxy statements to be incorporated in the proxy statement of AMCO, INDUSTRIES, INC., which are as follows:

PROPOSALS

(Submitted by Plaintiffs to be incorporated into the Proxy Statement of Amco Industries, Inc.)

RESOLVED that the officers and directors of AMCO INDUSTRIES, INC., are directed to institute legal proceedings to rescind the stock options granted in IRVING SWARTZBERG and his nominee, IRVRU COMPANY, and to recover the difference between the amount paid by him to AMCO INDUSTRIES, INC., and the amount that he will receive in the event a sale of the assets of the corporation is approved by the shareholders and the directors.

RESOLVED that the officers and directors institute legal proceedings to rescind stock options granted to IRVING SWARTZBERG, and to cancel the stock certificates issued to him or his nominee, IRVRU COMPANY, or in the alternative, that in the event a sale is approved by the shareholders and confirmed by the directors to "TOYOTA" that

AMCO INDUSTRIES, INC. recover the difference between the amount paid for the stock and the net amount scheduled for distribution.

RESOLVED that the officers and directors institute legal proceedings to collect from the officers and directors of AMCO, the sum of $850,000.00 paid to BUGS IMPORTS, INC., in settlement of its claim of $1,900,000.00.

That the judgment was rendered against AMCO as a result of the illegal cancellations of the distribution franchise to BUGS IMPORTS, INC.

That the shareholders should not suffer as the result of the illegal acts of the officers and directors in cancelling the franchise to BUGS IMPORTS, INC.

That Defendant AMCO filed the following objections to Plaintiff's Proposals to be included in the Proxy statement.

That by virtue of the objections filed by Defendant AMCO there is no basis for making a demand on the officers and directors of AMCO to institute action against themselves to recover the Corporate funds illegally used to pay BUGS IMPORTS, INC.

COUNT VI

That the action of the Board of Directors in entering into a long term Agreement with HAL M. QUINN, as President of AMCO and the payment of the 1975 bonus of $35,000.00 plus a special bonus of $70,000.00 is a misuse of Corporate Defendants' funds, since he has been president for only a couple of years and is a misuse and appropriation of Corporate funds.

COUNT VII

That the actions of TOYOTA MOTORS COMPANY, LTD., a Japan corporation; the actions of TOYOTA MOTOR SALES COMPANY, LTD., a Japan corporation;

"TOYOTA" (TOYOTA MOTOR SALES, U.S.A., INC., a California corporation), TOYOTA MOTOR DISTRIBUTORS, INC., and TMD SUBSIDIARY, INC., a subsidiary of "TOYOTA", and the actions of ISAO MAKINO, TSUNEO MORIYA, and TAKAYUKI OSUKA, were designed and intended to violate the provisions of the Automobile Distributors Franchise Act of 1956, 15 U.S.C., Section 1221, for the purpose of preventing anyone other than TMD to acquire the franchise from TOYOTA MOTOR SALES U.S.A., INC., a California corporation, referred to herein as "TOYOTA", and the direct parent company of TMD SUBSIDIARY, INC., and its assets at a fraction of its cost.

That, as a result of the illegal acts of "TOYOTA", the shareholders of Defendant AMCO INDUSTRIES, INC. ("AMCO") have suffered a loss of between nine and ten dollars per share, ($9.00 & $10.00), as evidenced by the market price of the stock on the Stock Exchange in January of 1973, as against the price being paid pursuant to the terms of the Merger Agreement, which is $4.60 per share.

That the total amount of stock issued and outstanding is $2,089,437.00, excluding Treasury shares and multiplied times $8.40 per share, the amount of loss sustained by all of the shareholders is approximately $16,800,000.00

That the Defendant LA SALLE NATIONAL BANK, Registrar of AMCO INDUSTRIES, INC., and as depository of the proceeds to be paid resulting from the terms of the Merger Agreement should be restrained from disbursing any funds until the Court has determined the validity of the terms of the merger and violations of the Automobile Distributors Franchise Act of 1956.

WHEREFOR, Plaintiffs pray as follows:

1. That the MERGER AGREEMENT entered into between Defendant, AMCO INDUSTRIES, INC. (AMCO),

a Delaware corporation, and TMD SUBSIDIARY, INC., a Delaware corporation, and TOYOTA MOTOR SALES USA, INC. ("TOYOTA"), a California corporation, BE RESCINDED and set aside until the further order of this Court;

2. That a DETERMINATION be made as to the GOOD FAITH AND INTIMIDATION made by TMD SUBSIDIARY, INC., and its parent corporation, TOYOTA MOTOR SALES U.S.A., INC., upon the dealers and officers of the Defendant, AMCO INDUSTRIES, INC., to force the sale of the assets of AMCO to TMD SUBSIDIARY INC., at a price of $4.60 per share.

3. That pursuant to the provisions of 15 U.S.C., Section 1221 of the Automobile Distributors Franchise Act of 1956, a JUDGMENT for TRIPLE DAMAGES be entered against TOYOTA MOTOR COMPANY, LTD., a Japan corporation; TOYOTA MOTOR SALES COMPANY, LTD., a Japan corporation; TOYOTA MOTOR DISTRIBUTORS, INC.; TOYOTA MOTOR SALES U.S.A., INC., a California corporation; TMD SUBSIDIARY INC. ("TMD"), a Delaware corporation; ISAO MAKINO, TSUNEO MORIYA, and TAKAYUKI OSUKA, for their participation in the conspiracy to violate the provisions of the Automobile Distributors Franchise Act of 1956.

4. That the Officers and Directors of AMCO INDUSTRIES, INC., be restrained from delivering any assets to TMD SUBSIDIARY, INC., or any of the other Japan corporations, or California corporations, or AMCO corporations, or subsidiaries associated therewith.

5. That the LA SALLE NATIONAL BANK, Registrar and transferee agent of AMCO INDUSTRIES, INC., and depository of the funds for distribution pursuant to the terms of the Merger, be restricted from distributing any

funds to any shareholders of Defendant, AMCO INDUSTRIES, INC.

6. Plaintiff further prays that JUDGMENT be entered against the officers and directors of AMCO INDUSTRIES, INC. IRVING SWARTZBERG, J. MYRON BAY, ADOLPH HIRSCH, ROBERT GORDON, JACK SOLOMON, Jr., and HAL M. QUINN, in the sum of $850,000.00, the amount paid to BUGS IMPORTS, INC., in settlement of its claim against defendant, AMCO INDUSTRIES, INC.

7. Plaintiffs further pray that judgment be entered against the officers and directors of Defendant, AMCO INDUSTRIES, INC., in the sum of $105,000.00, the amount of the bonus and special bonus paid or scheduled to be paid to HAL M. QUINN, President of AMCO INDUSTRIES, INC.

8. Plaintiffs further pray that they may have such further relief as the Court may deem proper.

DON ROSS,
EDWARD McDONALD,
MICHAEL ZABARAC,
Plaintiffs

By: WILLIAM HENNING RUBIN,
Their Attorney

AFFIDAVIT

WILLIAM HENNING RUBIN, Attorney for Plaintiffs-Shareholders, on oath deposes and says:

1. That on the date of each and every transaction involved in this Complaint, Plaintiffs were shareholders;

2. That the action is not a collusive one;

3. That demands were made upon the Officers and Directors to inspect the books, records and Corporate Minutes to ascertain what corporate action, if any, had taken place, what action was being considered with reference to Defendant AMCO by the Board of Directors in reference to the sale of the assets, by public sale, private sale, merger or liquidation;

4. That resolutions were submitted to the Securities and Exchange Commission to be included in the Proxy Statement of Defendant AMCO.

5. That management of AMCO opposed the Resolutions on the grounds that they were controversial, whereas, in fact Defendant AMCO was of the opinion that the information set forth in the Proxy Statement might cause the shareholders to vote against the proposal to merge.

6. That the Commission gave Plaintiffs the opportunity to file proceedings in the United States District Court to test the question as to whether the proposals that were being submitted were proper, but Defendant AMCO scheduled the meeting immediately following the receipt of the notice from the Securities and Exchange Commission and picked the date that oral argument was set for hearing in the United States Court of Appeals, in the case entitled, *Ross* v. *Swartzberg*, 73 C 127.

7. That the shareholders number 2,000 and are too numerous to file individual law suits so that a Class Suit

is the best method and manner of obtaining relief for all of the shareholders of the Class.

8. That the questions of Law and fact are common to all the members of the Class.

9. That the shareholders who submitted their stock to the transfer agent, LA SALLE NATIONAL BANK, did so due to the false and untrue statements that appeared in the Proxy Statement;

Further, this Affiant sayeth naught.

WILLIAM HENNING RUBIN,
Attorney For Plaintiffs

SUBSCRIBED and SWORN
to before me this 1st day of
JULY, 1976.

NOTARY PUBLIC

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DON ROSS, et al.,
Plaintiffs,
v.
IRVIN SWARTZBERG, et al.,
Defendants.
No. 75 C 4402

MEMORANDUM DECISION

This is a purported class action brought by plaintiffs, Don Ross, Edward McDonald, and Michael Zabarac, who are shareholders in defendant Amco Industries, Inc. In addition to Amco, the defendants named in the caption of the complaint include Irvin Swartzberg, J. Myron Bay, Adolph Hirsch, Robert Gordon and Jack Solomon, Jr., doing business as IRVRU, a partnership, successor and transferee of the assets of IRVRU, Inc., an Illinois corporation. Swartzberg, Bay and Hirsch are also alleged to be officers and directors of Amco. Max Becker and Hal M. Quinn are also defendants alleged to be officers and directors of Amco.

The other defendants are comprised of Toyota Motor Company, Ltd., a Japanese corporation, which is the manufacturer of Toyota motor vehicles, parts and accessories; Toyota Motor Sales Company, Ltd., a Japanese corporation, which is the exporter from Japan of the same vehicles, parts and accessories; Toyota Motor Sales, Inc., a California corporation and subsidiary of Toyota Motor Company, Ltd., which is the American importer of the vehicles, parts and accessories; Toyota Motor Distributors, Inc.,

whose place of incorporation is unidentified, which is a subsidiary of Toyota Motor Sales, Inc.; TMD Subsidiary, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toyota Motors Distributors, Inc.; Isao Makino, Tsuneo Moriya and Takayuki Osuka, who are former directors of Toyota Motor Sales, Inc., and are presently directors of Amco; The La Salle National Bank, a national banking association, which is the registrar and transfer agent of Amco.

Plaintiffs purport to represent all other shareholders in Amco situated similarly to plaintiffs. The action is not a derivative shareholders suit. Plaintiffs assert that their complaint is brought under the Automobile Distributors Franchise Act of 1956, the Securities Act of 1933, and the Securities Exchange Commission Act of 1934 and concepts of "pendent jurisdiction" with jurisdiction here under Sections 1331 and 1332 of Title 28. We note that the amended complaint seemingly alleges complete diversity.

"Plaintiffs' amended complaint is discursive, disjointed and unintelligible." It purports to incorporate by reference allegations made in two other actions, *Don Ross, et al.* v. *Irvin Swartzberg, et al.* 75 L 13624, and *Don Ross, et al* v. *Irvin Swartzberg, et al.*, No. 75 C 127, the forum of which is not identified. As best we can decipher it, the complaint asserts that a merger of Amco Industries, Inc. and TMD Subsidiary, Inc. will for unstated reasons violate the Automobile Distributors Franchise Act of 1956, the Securities Act of 1933 and the Securities Exchange Commission Act of 1934. Complaint is also made of a settlement by Amco of a judgment obtained against it by Bugs Imports, Inc., in case No. 2237 in the United States District Court for the Eastern District of Kentucky. This settlement, it is said, was effected for the sole purpose of enabling defendant Swartzberg and his associates to dispose of their stock holdings in Amco. Plaintiffs also complain of bonuses total-

ling $105,000 paid to defendant Quinn as president of Amco in 1975.

The quality of plaintiffs' presentation is so deficient as to compel us to conclude that they will not "fairly and *adequately* protect the interests of the (purported) class." Rule 23(a)(4), *Fed. R. Civ. P.;* emphasis supplied. Accordingly, class certification is denied.

All of the defendants have moved to dismiss the complaint. As previously noted, plaintiffs' amended complaint is unintelligible. It does not state a claim under which plaintiffs will be entitled to relief. The motions to dismiss are granted and judgment will enter dismissing the action.

ENTER:

JUDGE PRENTICE H. MARSHALL

DATED: 4-25-77

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted August 19, 1977
August 23, 1977.

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

DON ROSS, EDWARD McDONALD and MICHAEL ZABARAC,
Plaintiffs-Appellants,

No. 77-1736

vs.

IRVIN SWARTZBERG, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75-C-4402
Prentice H. Marshall, Judge

This matter comes before the court on the "MOTION TO DISMISS APPEAL" filed herein on August 2, 1977 by counsel for the defendants-appellees and the "ANSWER OF PLAINTIFFS-APPELLANTS TO MOTION OF DEFENDANTS-APPELLEES TO DISMISS THE APPEAL" filed herein on August 17, 1977 by counsel for the plaintiffs-appellants.

Final judgment was entered in this case on April 27, 1977. Twenty-three (23) days later, on May 20, 1977, plaintiffs-appellants served on opposing counsel a motion to vacate the order of dismissal and for leave to file a second amended complaint. The motion was denied by order dated

June 3, 1977, and plaintiffs filed their notice of appeal on June 14, 1977 from this order and from entry of final judgment.

The motion to vacate and for leave to file a second amended complaint was not served within ten (10) days of the entry of judgment and therefore did not toll the time for appeal from the final judgment. Fed. R. Civ. P. 59(e); Fed. R. App. P. 4(a). Similarly, since the motion to vacate (which we construe as one made pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, *see* 6A MOORE'S FEDERAL PRACTICE ¶ 59.12[1] at 247, 250-51 (2d ed. 1974)) was not timely filed, the district court lacked jurisdiction to entertain the motion. *Cf. Martinez* v. *Trainor*, 556 F.2d 818, 821 (7th Cir. 1977); *Nugent* v. *Yellow Cab Company*, 295 F.2d 794, 796 (7th Cir. 1961). Where the district court lacked jurisdiction to vacate its order of dismissal, it obviously could not permit the filing of a second amended complaint. An appeal should be taken from the judgment itself and an appeal will not lie from the order denying the untimely Rule 59(e) motion. *Cf. Gersing* v. *Chafitz*, 133 F.2d 384 (D.C. Cir. 1942). Accordingly, defendants-appellees' motion to dismiss is GRANTED and the appeal must be, and the same is hereby, DISMISSED for lack of jurisdiction.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

77C-3227

DON ROSS, EDWARD McDONALD and MICHAEL ZABARAC,

Plaintiffs,

versus

IRVIN SWARTZBERG: J. MYRON BAY: ADOLPH HIRSCH, ROBERT GORDON, JACK SOLOMON, JR., doing business as IRVRU, a partnership, successor, transferee and distributee of the assets of IRVRU, INC., an Illinois corporation on the 29th day of December, 1970; AMCO INDUSTRIES, INC., a Delaware corporation; HAL M. QUINN, President and Chief Operating Officer of AMCO INDUSTRIES INC., and MAX BECKER,

Defendants

COMPLAINT TO ENFORCE LIABILITY OF AMCO OFFICERS AND DIRECTORS FOR MISUSE OF CORPORATE FUNDS

PLAINTIFFS DON ROSS, EDWARD McDONALD and MICHAEL ZABARAC, shareholders of AMCO INDUSTRIES, INC., for and on behalf of themselves and all other shareholders in a representative capacity and similarly situated, hereby complain of the following Defendants: IRVIN SWARTZBERG, J. MYRON BAY, ADOLPH HIRSCH, ROBERT GORDON, JACK SOLOMON, JR., doing business as IRVRU, a partnership successor, transferee and distributee of the assets of IRVRU, INC., an Illinois corporation, pursuant to the resolution of said corporation on the 29th day of December, 1970; AMCO INDUSTRIES, INC., a Delaware corporation, HAL M. QUINN, President and Chief Officer of AMCO INDUSTRIES, INC.; and MAC BECKER.

PLAINTIFFS

1. DON ROSS is a resident of the City of Huntington Beach, California, and a shareholder of AMCO INDUSTRIES, INC., a Delaware corporation; EDWARD McDONALD is a resident of Grosse Point Woods, Michigan, a shareholder of AMCO INDUSTRIES, INC.; and MICHAEL ZABARAC is a resident of North Carolina and a shareholder of AMCO INDUSTRIES, INC.: all of the above plaintiffs were shareholders at the time of the transactions alleged in this Complaint.

DEFENDANTS

2. IRVIN SWARTZBERG is a resident of the City of Chicago and held himself out as Chairman of the Board of AMCO INDUSTRIES, INC.; J. MYRON BAY is a resident of the City of Chicago and State of Illinois and has held himself out as a director of AMCO INDUSTRIES, INC.; MAX BECKER is a resident of the City of Chicago and State of Illinois, and has held himself out as a director and treasurer of Defendant AMCO INDUSTRIES, INC.: ADOLPH HIRSCH is a resident of the City of New York and State of New York, and has held himself out as a director of Defendant AMCO INDUSTRIES, INC.:

HAL M. QUINN is a resident of the City of Chicago and State of Illinois, and is presently President and Chief Operating Officer of Defendant, AMCO INDUSTRIES, INC. AMCO INDUSTRIES, INC. is a defendant and distributor of TOYOTA Automobiles.

JURISDICTION AND VENUE

3. The jurisdiction of this court is invoked pursuant to Title 28, Sections 1331 and 1332 of the United States Code

of Judiciary and Judicial Procedure, and the principles of pendant jurisdiction.

PRELIMINARY STATEMENT

4. Plaintiffs are shareholders acting for and on behalf of themselves and all other shareholders of the class seeking the recovery of the sum of $425,000 paid by AMCO INDUSTRIES, INC., in settlement of the case entitled: BUGGS IMPORTS, INC. versus AMCO INDUSTRIES, INC. et al, Case Number 2237 in the U. S. District Court in the Eastern District of Kentucky, plus attorney fees paid by AMCO INDUSTRIES, INC., in defending that lawsuit. Plaintiffs also seek the recovery of the sum of $105,000 paid to Hal M. Quinn, President of Amco Industries, Inc.

COUNT I

5. Plaintiffs allege for and on behalf of themselves and all other shareholders of the class, that as a result of the illegal acts of Defendants as directors of AMCO, the franchise by AMCO INDUSTRIES, INC. to BUGGS IMPORTS, INC. was illegally terminated.

6. That the illegal acts of the Board of Directors and Officers of AMCO Industries, Inc. resulted in a judgment being entered against AMCO INDUSTRIES, INC. in the sum of $1,670,625.00 plus attorney fees in the sum of $200,000.00. (Copy of Judgment entered in U. S. District Court Eastern District of Kentucky No. 2237).

7. That pursuant to the corporate resolution of the officers and directors, the judgment obtained by Buggs Imports, Inc. in the sum of $1,670,625 plus attorney fees of $200,000 was settled for the sum of $850,000—$425,000 of which came out of the corporate treasury of AMCO IN-

DUSTRIES, INC., and the other $425,000 was paid by TMD Subsidiary, Inc., a Delaware Corporation, which purchased the assets of AMCO INDUSTRIES, INC.

8. That in addition to the $425,000 AMCO INDUSTRIES INC. paid a very substantial sum to its attorneys for defending the litigation instituted by Bugs Imports, Inc., in the case filed in the United States District Court of Kentucky, Eastern District.

9. That Plaintiffs seek the recovery from the officers and directors of all sums paid in connection with the settlement of the judgment in the proceedings of *Bugs Imports Inc.*, vs. *Amco Industries, Inc.*, Case No. 2337 in the United States District Court, Eastern Division of Kentucky.

10. That Plaintiffs seek the recovery from the officers and directors of all sums paid for legal fees by AMCO INDUSTRIES, INC., from its corporate treasury.

11. That all of the acts of the Board of Directors and officers approving the cancellation of the franchise of Bugs Imports, Inc., and the payment of the funds in settlement thereof were by corporate resolution, thereby making all of the corporate officers and directors responsible for those acts.

COUNT II

12. Plaintiffs seek the recovery from the Board of Directors and its officers of AMCO INDUSTRIES, INC., the sum of $35,000 paid to Hal M. Quinn, termination pay as President of AMCO INDUSTRIES, INC., and a special bonus of $70,000.

13. That Defendants as officers and directors were fully aware of their intention to dispose of the assets of AMCO INDUSTRIES, INC.; that Defendants were negotiating

with other firms for the taking over of AMCO INDUSTRIES, INC., and, in utter disregard of their fiduciary capacity to the other shareholders misused corporate funds in paying the sum of $105,000.00 to HAL M. QUINN.

DEMAND ON CORPORATE OFFICERS AND DIRECTORS NOT REQUIRED, SINCE IT IS FUTILE.

14. Plaintiffs filed these proceedings for and on behalf of themselves and all other members of the class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

15. That these proceedings meet all of the requirements of Rule 23 as follows:

> "(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

16. That no demand has been made on AMCO INDUSTRIES, INC. the Delaware corporation, since plaintiffs heretofore submitted to the Securities and Exchange Commission prior to the date set for the special meeting of shareholders, the following resolution:

> "RESOLVED That the officers and directors institute legal proceedings to collect from the officers and directors of AMCO, the sum of $850,000.00 paid to BUGS IMPORTS, INC., in settlement of its claim of $1,900,000.00."

17. That the Defendant officers and directors opposed the resolution and filed objections to that effect with the Securities and Exchange Commission.

18. That said objections are evidence that a demand upon the officers and directors of the corporation for the institutions of legal proceedings to recover the amounts paid in settlement of the Bugs Imports, Inc. judgment and the bonus to Hal M. Quinn would be a futile matter.

19. That over 47 percent of the stock of AMCO INDUSTRIES, INC. is owned by IRVIN SWARTZBERG and his associates and quite obviously they will not institute suit against themselves; and the court must take judicial notice thereof.

20. That pursuant to Rule 23(c) of the Federal Rules of Civil Procedures, a hearing being held and a determination being made by order of court that it is a class action for and on behalf of all of the shareholders of the class pursuant to notice to be approved by order of the court.

21. That in view of the illegal dealings of the officers and directors of AMCO INDUSTRIES, INC., the officers and directors that were shareholders should be barred from participating in any recovery from the officers and directors for the amounts illegally disbursed in settlement of the judgment obtained by Bugs Imports, Inc. against AMCO INDUSTRIES, INC. and the sum of $105,000 paid to Hal M. Quinn as President, and from the amount recovered for the payment of attorney fees incurred by AMCO Industries in defense of the proceedings entitled: Bugs Imports, Inc. v. Amco Industries, Inc., et al., Cause 2237 in the U.S. District Court for the Eastern District of Kentucky.

22. That the officers and directors of AMCO INDUSTRIES, INC., namely Irvin Swartzberg, J. Myron Bay, Adolph Hirsch, Robert Gordon, Jack Solomon Jr., Hal M. Quinn and Max Becker, be barred from participating in any recovery of funds obtained from the officers and directors in payment of the sum of $425,000 to judgment creditor Bugs Imports, Inc., and for the sum of $425,000 paid by TMD Subsidiary, Inc., which funds would otherwise have been paid to Amco Industries, Inc.; that the Defendants as shareholders be barred from receiving any sum repaid to Defendant Amco Industries, Inc. by the officers and directors for the sum of $105,000 paid to Hal M. Quinn as President, and from the sum recovered from the payment of attorney fees in the Bugs Imports, Inc. U.S. District Court of Eastern Kentucky case.

WHEREFORE, Plaintiffs Pray:

1. That summons issue against the Defendants and they be required to plead to the Complaint within twenty (20) days from the date of service;

2. That judgment be entered against the officers and directors of AMCO INDUSTRIES, INC.; IRVIN SWARTZBERG, J. MYRON BAY, ADOLPH HIRSCH, ROBERT GORDON, JACK SOLOMON, JR., HAL M. QUINN and MAX BECKER, in the sum of $425,000 paid by AMCO INDUSTRIES, INC., in settlement of the Bugs Imports, Inc. judgment against AMCO INDUSTRIES, INC.; the sum of $105,000 paid to Hal M. Quinn, plus attorney fees incurred by Amco Industries, Inc., in defending the legal proceedings instituted by Bugs Imports, Inc. against AMCO Industries, Inc.

3. That a hearing be held to determine the members of the class and a notice be sent to all members of the class, pursuant to Rule 23 of the Federal Rules of Civil Procedure;

4. That the officers and directors of AMCO Industries, Inc., namely Irvin Swartzberg, J. Myron Bay, Adolph Hirsch, Robert Gordon, Jack Solomon, Jr., Hal M. Quinn and Max Becker, who were shareholders, should be barred from participating in any recovery from the officers and

directors for the amounts illegally disbursed in settlement of the judgment obtained by Bugs Imports, Inc. against Amco Industries, Inc. and the sum of $105,000 paid to Hal M. Quinn as President, and from the amount recovered for the payment of attorney fees incurred by Amco Industries in defense of the proceedings entitled: Bugs Imports, Inc. v. Amco Industries, Inc., et al, Cause 2237 in the U. S. District Court for the Eastern Division of Kentucky.

Plaintiff further prays that they may have such further relief as the Court deems proper.

DON ROSS, EDWARD McDONALD and
MICHAEL ZABARAC, Plaintiffs,

By WILLIAM HENNING RUBIN

WILLIAM HENNING RUBIN
188 W. Randolph—714
Chicago, Illinois 60601
263-6780

AFFIDAVIT

WILLIAM HENNING RUBIN Attorney for Plaintiffs-Shareholders, on oath deposes and says:

1. That on the date of each and every transaction covered by this Complaint, Plaintiffs were shareholders in Defendant corporation, AMCO INDUSTRIES, INC.;

2. That this action is not a collusive one;

3. That Plaintiffs as shareholders made a demand upon the Defendant Corporation, AMCO INDUSTRIES, INC., to include in the proxy statement resolutions that the Directors and Officers of the corporation institute legal proceedings to collect from the officers and directors of Amco Industries, Inc., the sum of $850,000 paid to Bugs Imports, Inc. in settlement of its $1,900,000 that the officers and directors of Amco Industries, Inc. opposed the resolution before the Securities and Exchange Commission;

4. That while the officers and directors of Amco Industries Inc. only disbursed the sum of $425,000, the other $425,000 was supplied by TMD Subsidiary, Inc., which would otherwise have been paid to Amco Industries, Inc. for distribution to Plaintiff Shareholders and all other shareholders of the class.

5. That no demand was made on the Board of Directors of Amco Industries, Inc. that an action be brought to obtain redress for Defendant corporation for the described wrongful acts as set forth in the Complaint, for the reason that such demand would be useless and fruitless, in that all of the members of the Board of Directors were involved and participated in the wrongs alleged herein; that the Board of Directors is completely under the control of Irvin Swartzberg, Chairman of the Board of Directors, and the controlling partner in IRVRU Company which owns approximately 47 percent of the outstanding shares.

6. That other members of the Board of Directors individually own substantial amounts of stock in Amco Industries, Inc.

7. That the payment of $105,000 to Hal M. Quinn is a complete gratuity at the expense of the Plaintiffs-Shareholders and all other members of the class since he does not have the qualifications that would justify the payment of that sum of money to him in termination of an employment contract which was executed for the purpose of keeping the president "on the side of" Irvin Swartzberg and his associates.

8. That these proceedings are filed for and on behalf of all other members of the class similarly situated and pursuant to the provisions of Rule 23(c) of the Federal Rules of Civil Procedure.

9. That the shareholders are in excess of 2,000 and are too numerous, and the amounts held by each in some cases are very small and do not warrant the filing of individual lawsuits; so that, a class suit is the most feasible for the protection of all the shareholders of the class.

10. That the questions of law in fact are common to all members of the class.

AFFIANT FURTHER SAITH NAUGHT.

WILLIAM HENNING RUBIN

SUBSCRIBED AND SWORN TO
before me this 30th day
of August, 1977.

MAUREEN NAQALERA
Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION
FILE NO. 2237

JUDGMENT

BUG'S IMPORTS, INC.
Plaintiffs

v.

AMCO INDUSTRIES, INC. *et al*
Defendants

• • • • •

This action having come on for trial before the Court and a jury, and the issues having been duly tried and submitted to the jury and the jury after deliberation having rendered its verdict finding that defendant Toyota Motors Sales U.S.A., Inc. was not guilty of any of the charges alleged in the complaint as amended IT IS THEREFOR ORDERED AND ADJUDGED that the complaint as amended be and the same is hereby dismissed as to said defendant Toyota Motor Sales U.S.A., Inc. and said defendant Toyota Motor Sales U.S.A., Inc. is hereby awarded a judgment against plaintiff, Bug's Imports, Inc., for its taxable costs incurred in the within styled action.

The jury having further rendered a verdict awarding plaintiff, Bug's Imports, Inc., the sum of Five Hundred Eighteen Thousand Two Hundred Seventy-five Dollars ($518,275) as actual damages sustained by said plaintiff and the sum of Thirty-eight Thousand Six Hundred Dollars ($38,600) for price discrimination making a total award of

Five Hundred Fifty-six Thousand Eight Hundred Seventy-five Dollars ($556,875) against the defendants Amco Industries, Inc. and Mid-Southern Toyota Distributors, Inc. (said Mid-Southern Toyota Distributors, Inc. being a successor corporation to Mid-Southern Toyota Limited, Inc. and being one and the same corporation as said Mid-Southern Toyota Limited, Inc.) and pursuant to Title 15, Section 15, United States Code.

IT IS ORDERED AND ADJUDGED that plaintiff, Bug's Imports, Inc. recover of the defendants, Amco Industries, Inc. and Mid-Southern Toyota Distributors, Inc. (said Mid-Southern Toyota Distributors, Inc. being successor corporation to Mid-Southern Toyota Limited, Inc. and being one and the same corporation as said Mid-Southern Toyota Limited, Inc.) three-fold the damages sustained by it as reflected in the verdict, a total of One Million Six Hundred Seventy Thousand Six Hundred Twenty-five Dollars ($1,670,625) with interest thereon at the rate of six (6) per cent per annum as provided by law from the date of entry of this judgment until paid together with the costs incurred herein by plaintiff including a reasonable attorneys fee for the attorneys for plaintiff to be fixed by the Court at a later date.

Dated at Lexington, Kentucky, this the 15th day of March, 1974.

BERNARD .....
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 3227

DON ROSS, EDWARD McDONALD,
and MICHAEL ZABARAC,

Plaintiffs,

v.

IRVIN SWARTZBERG, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff has filed a complaint in two counts seeking to enforce the liability of officers and directors of defendant Amco Corporation for the alleged misuse of corporate funds. The defendants have moved to dismiss plaintiffs' complaint on the grounds that a previous decision rendered by Judge Marshall in case No. 75 C 4402 is *res judicata* of the merits of plaintiffs' present complaint. In opposition to that motion, plaintiff contends that the plea of *res judicata* can only be raised by answer and not by a pre-answer motion to dismiss. Further, plaintiff contends that Judge Marshall's decision in the previous case was not a decision on the merits of that case such that the defendants can now invoke the doctrine of *res judicata* to defeat plaintiffs' claim in the instant action. Defendant also claims that Judge Marshall's decision was a dismissal without prejudice and that it could not be construed as a dismissal with prejudice since there was no finding on the merits.

Plaintiffs' first contention, that *res judicata* cannot be

raised by a pre-answer motion, is erroneous. In *Lambert* v. *Conrad,* 536 F.2d 1183 (7th Cir. 1976), the court said:

> Plaintiff argues that it was not proper for the defendant to raise the issue of res judicata by a pre-answer motion because it is not one of the defenses enumerated in Fed.R.Civ.P. 12(b). This argument is without merit . . . [I]t is . . . clear that res judicata may be raised by pre-answer motion or at least that it is within the district court's discretion to allow it to be so raised.

Id. at 1186. (Citations omitted)

Count I of plaintiffs' complaint, which is brought for and on behalf of all shareholders of Amco Industries, Inc., alleges that because of the illegal acts of the directors and officers of Amco, a judgment in the amount of $1,670,625, plus attorneys' fees in the sum of $200,000 was entered against Amco Industries in the United States District Court for the Eastern District of Kentucky. Count I further alleges that that judgment was settled for the sum of $850,000. Amco Industries paid half of the settlement, and the other half was paid by TMD Subsidiary, Inc., a Delaware corporation, which purchased the assets Amco Industries, Inc. Plaintiffs in this action seek the recovery of all sums paid by Amco in settlement of the Kentucky action.

In Count II, plaintiffs seek the recovery of $35,000 paid to Hal M. Quinn, former president of Amco Industries, Inc., as termination pay. Plaintiffs also seek a recovery of a special bonus of $70,000 paid to Quinn pursuant to the acts of the officers and directors of Amco. These payments, plaintiffs allege, were a misuse of corporate funds by the officers and directors in violation of their fiduciary duties to the other shareholders.

Count IV of the complaint filed in case No. 75 C 4402, which was dismissed by Judge Marshall, reads:

Count IV

> That the acts of the officers and directors of Defendant, AMCO, by their illegal acts caused the Defendant AMCO to sustain a judgment against it in the U.S. District Court in the sum of $1,670,625.000 plus attorneys' fees of $200,000.00, in the case entitled: *Bugs Imports, Inc.,* v. *Amco Industries, Inc. & its Subsidiaries, Mid-Central Toyota Distributors, Inc.,* Case No. 2237, in the Eastern District of Kentucky.
>
> That Defendant AMCO INDUSTRIES, INC. used Corporate funds in the sum of $850,000.00 to settle this obligation.
>
> That the litigation resulted from the illegal acts of the officers and directors in cancelling the franchise agreements and they should be required to reimburse the corporation for all funds disbursed in settlement of the BUGS IMPORTS, INC. litigation.
>
> That the settlement with BUGS IMPORTS, INC. and dismissing the appeal was for the sole purpose of enabling Defendant IRVING SWARTZBERG and his associates to dispose of their stockholdings in the corporation.

Count VI of that complaint reads as follows:

Count VI

> That the action of the Board of Directors in entering into a long term Agreement with HAL M. QUINN, as President of AMCO and the payment of the 1975 bonus of $35,000.00 plus a special bonus of $70,000.00 is a misuse of Corporate Defendants' funds, since he has been president for only a couple of years and is a misuse and appropriation of Corporate funds.

The pertinent provisions of Judge Marshall's opinion and order dismissing case No. 75 C 4022 for failure to state a claim upon which relief can be granted as set forth below:

> Plaintiffs' amended complaint is discursive, disjointed and unintelligible. It purports to incorporate

by reference allegations made in two other actions, *Don Ross, et al.* v. *Irvin Swartzberg, et al.*, 75 L 13624, and *Don Ross, et al.* v. *Irvin Swartzberg, et al.*, No. 73 C 127, the forum of which is not identified. As best we can decipher it, the complaint asserts that a merger of Amco Industries, Inc. and TMD Subsidiary, Inc. will for unstated reasons violate the Automobile Distributors Franchise Act of 1956, the Securities Act of 1933, and the Securities Exchange Commission Act of 1934. Complaint is also made of a settlement by Amco of a judgment obtained against it by Bugs Imports, Inc., in case No. 2237 in the United States District Court for the Eastern District of Kentucky. This settlement, it is said, was effected for the sole purpose of enabling defendant Swartzberg and his associates to dispose of their stock holdings in Amco. Plaintiffs also complain of bonuses totalling $105,000 paid to defendant Quinn as president of Amco in 1975.

• • •

All of the defendants have moved to dismiss the complaint. As previously noted, plaintiffs' amended complaint is unintelligible. It does not state a claim under which plaintiffs will be entitled to relief. The motions to dismiss are granted and judgment will enter dismissing the action.

The question presented to this court is whether or not Judge Marshall's previous ruling dismissing the plaintiff's complaint for failure to state a claim is *res judicata* of the two-count complaint presently before the court. Plaintiff contends that the previous dismissal was without prejudice because it was not an adjudication upon the merits.

Rule 41(b) of the Federal Rules of Civil Procedures states:

> Unless the court in its order of dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Nothing in Judge Marshall's order specifies that the dismissal was without prejudice. Judge Marshall characterized plaintiff's complaint as "unintelligible". Yet he was obviously apprised of the allegations of Counts IV and VI of the complaint which are essentially the same as Counts I and II of the complaint before this court in the instant litigation. We find no essential element in the present complaint which was not contained in the complaint before Judge Marshall. Indeed, if the previous complaint were dismissed for lack of some necessary allegation of the complaint and that allegation were contained in the present complaint, the previous dismissal for failure to state a claim would not be *res judicata* of the present complaint. *See* Comment *c*, § 50, Restatement, Judgments; *see also Rinehart* v. *Locke*, 454 F.2d 313 (7th Cir. 1971).

However, since the allegations of the present complaint are essentially the same as those contained in the earlier dismissed complaint, and since the previous court did not specify that the dismissal was without prejudice, we rely on the authority of Rule 41(b) and the Seventh Circuit's interpretation of the effect of that rule in *Rinehart* v. *Locke*, *supra*. Therein, the court said:

> [W]e are persuaded that under the Rule [41(b)] an order of a district court which dismisses a complaint for failure to state a claim, but which does not specify that the dismissal is without prejudice, is res judicata as to the then existing claim which it appears plaintiff was attempting to state. This view places upon a plaintiff in a case like the 1969 case in this instance the burden of persuading the district court either to include a specification that the dismissal is without prejudice or to permit an amendment. If plaintiff is unsuccessful, his

recourse is appeal. We think this view is consistent with the expedient purpose of the Rules.

454 F.2d 313 at 315.

Because the court has considered matters outside of plaintiff's complaint, defendants' motion to dismiss is treated as one for summary judgment based on the grounds of *res judicata*. And in accordance with the foregoing, defendants' motion is granted.

ENTER:

Frank McGarr
UNITED STATES DISTRICT JUDGE

DATED: March 20, 1978

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued December 12, 1978
January 3, 1979

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

DON ROSS and
MICHAEL ZABARAC,
Plaintiffs-Appellants,

No. 78-1629

vs.

IRVIN SWARTZBERG, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-3227
Frank J. McGarr, Judge.

ORDER

After reviewing the record and briefs filed in this case and having heard oral argument, we affirmed the judgment of the district court from the bench.

Appellants contend on appeal that for an involuntary order of dismissal to have a *res judicata* effect on a virtually identical subsequently filed complaint, the order dismissing the prior complaint must have specified that the order was entered with prejudice.

Appellants' contention is erroneous. Rule 41(b) of the Federal Rules of Civil Procedure states:

Unless the court in its order of dismissal otherwise specifies, a dismissal under this subdivision and any dis-

> missal not provided for in this Rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

If, as in appellants' previous cause of action, an order dismissing a complaint does not specify otherwise, Rule 41(b) renders the order of dismissal a dismissal with prejudice, which in turn operates as an adjudication upon the merits of the complaint. *Rinehart* v. *Locke,* 454 F.2d 313 (7th Cir. 1971).

Therefore, the district judge correctly ruled that appellants' previously dismissed complaint was *res judicata* of the merits of appellants' subsequently filed complaint that contained virtually the same allegations alleged against the same parties. The order of the district court is affirmed.

Supreme Court, U. S.
FILED
APR 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1427

DON ROSS and MICHAEL ZABARAC,
Petitioners,

vs.

IRVIN SWARTZBERG, et al.,
Respondents.

From the:
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois
Cause No. 78-1629

On Appeal From:
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
Number: 77-C-3227
Honorable FRANK J. MCGARR, *Judge Presiding*

BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

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Number 77-C-3227
Honorable FRANK J. MCGARR, *Judge Presiding*

BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED FOR REVIEW.

Whether, under Rule 41(b) of the Federal Rules, a district court's dismissal of a prior complaint for failure to state a claim

operates as an adjudication upon the merits and has *res judicata* effect upon virtually identical allegations made by the same plaintiffs against the same defendants in a subsequently filed complaint.

COUNTER-STATEMENT OF THE CASE.

Plaintiffs-petitioners' statement of the case contains incorrect and irrelevant assertions compelling defendants-respondents to restate the facts of the case.

Plaintiffs filed the instant two-count complaint in the District Court for the Northern District of Illinois (Case No. 77 C 3227) seeking to enforce the liability of officers and directors for alleged misuse of corporate funds. (A. 25.)[1] The defendants moved to dismiss the complaint on the grounds that a previous decision rendered in the same District Court by the Honorable Prentice H. Marshall (Case No. 75 C 4402) was *res judicata* of the merits of plaintiffs' subsequent complaint. (Record, Item No. 4.)

Judge Marshall had dismissed plaintiffs' prior seven-count complaint filed against the same defendants characterizing that complaint as "discursive, disjointed and unintelligible". (A. 20.) Judge Marshall held:

> "It does not state a claim under which plaintiffs will be entitled to relief." (A. 22.)

Plaintiffs then appealed from Judge Marshall's ruling and the Court of Appeals for the Seventh Circuit dismissed plaintiffs' appeal. (A. 23.) No petition for a writ of certiorari to this Court was filed.

Plaintiffs simply then refiled virtually the identical[2] Counts IV and VI of the prior complaint as the two-count present

1. Citations are either to Petitioners' Appendix filed with their petition or to the record items themselves.

2. Both the District Court and the Appellate Court found the two counts of the instant complaint to be essentially identical to Counts IV and VI of the prior complaint (A. 41, A. 44) and

(Footnote continued on next page.)

complaint. (A. 25.) The Honorable Frank J. McGarr, treating defendants' motion to dismiss as a motion for summary judgment, granted summary judgment on both counts. (A. 37.) Judge McGarr held, relying on the authority of Rule 41(b) of the Federal Rules of Civil Procedure, that since Judge Marshall had not specified that his dismissal was without prejudice, the previous dismissal operated as an adjudication upon the merits of plaintiffs' claim. (A. 41.)

Plaintiffs appealed and Judge McGarr's decision was affirmed from the bench by the Seventh Circuit Court of Appeals. (A. 43.)

ARGUMENT.

The Question Presented for Review Is Insubstantial.

The sole question which plaintiffs seek this Court to review is whether a district court's dismissal of a complaint for failure to state a claim operates as an adjudication upon the merits and is *res judicata* of a subsequent complaint by the same plaintiffs, against the same defendants, containing virtually identical allegations.

Plaintiffs contend that for an involuntary order of dismissal to have a *res judicata* effect on a virtually identical subsequently filed complaint, the order dismissing the prior complaint must have specified that it was entered with prejudice.

Plaintiff's contention however is obviously erroneous in light of the plain language of Rule 41(b) of the Federal Rules of Civil Procedure. Rule 41(b) states:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal

(Footnote continued from preceding page.)

plaintiff did not on appeal to the Appellate Court seek to distinguish Counts IV and VI of the former complaint (No. 75 C 4402) from the instant two count complaint (No. 77 C 3227) and have not sought to distinguish the two complaints to this Court. Apparently the patently repetitious nature of the instant complaint is no longer at issue.

not provided for in this Rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

It is thus clear that where an order does not otherwise specify, Rule 41(b) renders the order of dismissal a dismissal with prejudice which in turn operates as an adjudication upon the merits unless the dismissal is for lack of jurisdiction, improper venue, or failure to join a party under Rule 19. The effect of Rule 41(b) in this regard has been unanimously affirmed in numerous decisions which have all held that where a dismissal of a complaint does not specify to the contrary it operates as an adjudication on the merits and is *res judicata* of the same allegations in a subsequent complaint. *See e.g., Hall* v. *Tower Land and Investment Company*, 512 F. 2d 481, 483 (5th Cir. 1975); *Rinehart* v. *Locke*, 454 F. 2d 313, 315 (7th Cir. 1971); *Glick* v. *Ballentine Produce, Inc.*, 397 F. 2d 590, 593 (8th Cir. 1968); *Ma Chuck Moon* v. *Dulles*, 237 F. 2d 241, 242 (9th Cir. 1956), *cert. denied*, 352 U. S. 1002, 77 S. Ct. 559; *Bowles* v. *Biberman Bros.*, 152 F. 2d 700, 701 (3rd Cir. 1945).

There are no decisions which have held otherwise. Indeed, it is clear that a contrary decision would be patently wrong in that it would in effect sanction the review by one district court judge of the decision of another. This was recognized by Judge McGarr in his ruling wherein he states:

> "Nothing in Judge Marshall's order specifies that the dismissal was without prejudice. Judge Marshall characterized plaintiff's complaint as 'unintelligible'. Yet he was obviously apprised of the allegations of Counts IV and VI of the complaint which are essentially the same as Counts I and II of the complaint before this court in the instant litigation. We find no essential element in the present complaint which was not contained in the complaint before Judge Marshall. Indeed, if the previous complaint were dismissed for lack of some necessary allegation of the complaint and that allegation were contained in the present complaint, the previous dismissal for failure to state a claim would not be *res judicata* of the present complaint. *See* Comment c, § 50, Restatement, Judgments; *see also Rinehart* v. *Locke*, 454 F. 2d 313 (7th Cir. 1971)."

In other words, once Judge Marshall examined the plaintiffs' complaint and found that it failed to state a cause of action, it is obvious that Judge McGarr is precluded from examining a part of the same complaint and now finding that it does state a cause of action. The sole question presented for review is thus clearly insubstantial.

Plaintiffs in their petition for certiorari argue that there is substantial merit to the factual allegations of their complaint. The substantive merits of plaintiffs' complaint however are not even remotely relevant to this appeal.[3] Plaintiffs also cite *Gilbert* v. *Braniff International Corp.*, 579 F. 2d 411 (7th Cir. 1978) in an attempt to argue that there is a conflict between the Appellate Court decisions. But as we have seen no such conflict exists. Moreover, *Gilbert* was decided under state procedural rules[4] and not under Rule 41(b) and anyway, in *Gilbert*, the order of dismissal specifically granted plaintiffs 28 days in which to amend. *Id.* at 413.

Having failed to perfect an appeal in the prior case (Case No. 75 C 4402), plaintiffs may not skirt the *res judicata* effect of the prior dismissal by merely instituting a new action with the refiling of the prior complaint.

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3. Plaintiffs' scattered efforts to argue the facts which form the basis of their complaint do not require a response in this brief. The issue is not whether plaintiffs can state or have stated a claim for which relief can be granted, but whether a prior decision of a district court on that precise point bars its re-litigation now. *See Rinehart* v. *Locke, supra.*

4. Ill. Supreme Court Rule 273 (Ill. Rev. Stat. Ch. 110A § 273).

CONCLUSION.

For the reasons set forth above, plaintiffs' petition for a writ of certiorari is totally devoid of any merit, and there is no reason for this court to grant certiorari in the present case.

Respectfully submitted,

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